U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk, Suite 204
Newport News, VA 23606

(757) 591-5140 (TEL)
(757) 591-5150 (FAX)

Issue Date: 26 September 2005

Case No. 2002-LHC-02532

OWCP No. 10-35050

In the Matter of

STEPHEN COX,
Claimant,
v.

McDONNELL DOUGLAS/BOEING,
Employer,

FREEMONT COMPENSATION INSURANCE GROUP,
Carrier, *Insolvent*

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party In Interest

Appearances:
Robert T. Newman, Esq., for Claimant
Daniel F. Valenzuela, Esq., for Employer
Karen L. Mansfield, Esq., for Director

Before:
RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER ON REMAND GRANTING EMPLOYER SECTION 8(f) RELIEF

This proceeding involves a claim for disability from an injury suffered by Claimant, Stephen Cox, covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq*. (hereinafter referred to as the "Act"), as extended by the Defense Base Act, 42 U.S.C. § 1651 *et seq*. (hereinafter "DBA"). The claim was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. A formal hearing was held on March 13-14, 2003, in Atlanta, Georgia.

On June 17, 2003, a Decision and Order was issued awarding permanent partial disability compensation to the Claimant, Stephen Cox, for disability from an injury under the Defense Base

Act, 42 U.S.C. § 1651 *et seq*. (hereinafter "DBA"). The award was based upon stipulations of facts between the parties. Subsequently, on July 2, 2003 a Decision and Order on Reconsideration was issued, based upon additional post trial stipulations. The sole remaining issue was the Employer's request for relief under §8(f) of the Act. On December 31, 2003, a Decision and Order Granting Section 8(f) Relief was issued (served by the District Director on January 12, 2004).

The Director appealed the December 31, 2003 decision to the Benefits Review Board ("the Board") on February 11, 2004. On January 18, 2005, the Board issued a Decision and Order vacating the award of §8(f) relief and remanding the case for further proceedings. The Board's decision does not address any element of the awards of compensation to the Claimant, and it does not appear that those orders were appealed. Therefore, the award of compensation to Claimant was not disturbed on appeal, and is not affected by the proceedings herein.

On February 11, 2005, a letter was received from Counsel for the Employer in which he requested that the record be reopened to permit retaking of the deposition of Dr. Foster and a Vocational Rehabilitation Counselor, and further to permit live testimony, if necessary. The letter was treated as a motion to reopen the record. It was determined that good cause had been shown to partially grant the motion. However, good cause has not been shown to conduct a supplemental hearing for presentation of live testimony. The record was reopened until August 15, 2005, for the limited purpose of submission of documentary evidence or depositions addressing the following issues:

1. The extent of Claimant's loss of wage earning capacity which is solely due to the work related injuries sustained by Claimant on August 14, 1995;

2. The extent, if any, that the Claimant's manifest pre-existing disabilities contributed to Claimant's present loss of wage earning capacity.[1]

Employer submitted four additional exhibits (AEX 1 – 4) on August 16, 2005. The Director submitted a brief on remand on August 29, 2003. Employer submitted a brief on remand on August 31, 2005.

[1] In its brief on remand, the Director objects to Employer's motion to reopen the record. The Director argues that it never received the request, and that it is not based upon new evidence which was not available at the time of the hearing. However, the Employer's letter indicates that it was also sent to both the Office of the Solicitor and the District Director. Further, counsel for the Solicitor participated in the depositions of Dr. Adams and Ms. Quinn, taken after Employer's request to reopen the record was made. Thus, there is sufficient evidence that the Director had notice of Employer's request to reopen the record, and failed to timely object to this request. An administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if shown to be arbitrary, capricious, or an abuse of discretion. *Cooper v. Offshore Pipelines International, Inc.*, 33 BRBS 46 (1999); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). As I had previously determined that good cause was shown to reopen the record for the aforementioned limited purpose (*supra*), the Director's objection is denied.

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

The sole issue to be resolved on remand is whether the Employer is entitled to Special Fund relief under § 8(f) of the Act.

DISCUSSION OF LAW AND FACTS

Section 8(f) Relief

Section 8(f) of the Act was intended to encourage the hiring and retention of partially disabled workers by protecting employers from the harsh effects of the aggravation rule. *Lawson v. Suwanee Fruit & S.S. Co*., 336 U.S. 198, 201 (1949); *C & P Tel. Co. v. Director, OWCP*, 564 F.2d 503, 512 (D.C. Cir. 1977). Section 8(f) dispels the hesitancy that employers may have in hiring and retaining workers with an existing partial disability who, if injured in the new employment, could "suffer a resulting disability greater than a healthy worker would [suffer]." *C & P Tel. Co*., 564 F.2d at 512. In furtherance of this goal, the provisions of Section 8(f) are to be liberally construed. *Director, OWCP v. Todd Shipyards Corp.*, 625 F.2d 317 (9th Cir. 1980).

An employer who is granted relief under Section 8(f) is responsible only for the portion of the total disability caused by the last injury. *Id.* at 318. Generally, an employer pays 104 weeks of disability compensation, while the Special Fund pays the remainder of the compensation due the injured employee. *C & P Tel. Co.*, 564 F.2d at 510. Monies are paid into the Special Fund, created by 33 U.S.C. § 944, by insurance carriers and self-insurers. *Id*.

In order to receive relief, Section 8(f) requires that an employer show: (1) the employee had an existing permanent partial disability prior to his most recent injury; (2) the employee's existing permanent partial disability was manifest to the employer prior to the most recent injury; and (3) the employee thereafter suffers from a disability which is found not to be due solely to the injury. 33 U.S.C. § 908(f)(1) (2002); *Director, OWCP v. Cargill, Inc.*, 709 F.2d 616, 619 (9th Cir. 1983); *Todd Shipyards Corp.*, 625 F.2d at 319; *C & P Tel. Co.*, 564 F.2d at 514. The burden of proof is on the employer/carrier. 20 C.F.R. § 702.321(a) (2003); *see Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1144 (9th Cir. 1991); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 114 (4th Cir. 1982). In cases where an employee is permanently partially disabled as a result of the combination of the pre-existing condition and the new injury, the employer must additionally show that the resulting disability is "materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. § 908(f)(1) (2002); *see also* 20 C.F.R. § 702.321(a) (2003).

The Board's Decision and Order remanding the present case found that the contribution element was not satisfied by the fact that Dr. Foster has apportioned the causes of claimant's physical impairments between the pre-existing and work injuries. Instead, the Board requires

that the Employer must demonstrate that the work-injury alone did not cause claimant's loss in wage earning capacity and that the pre-existing conditions materially and substantially contributed to this disability. Therefore, this case was remanded for consideration of the evidence of record under the proper legal standards. On remand, the extent of Claimant's current permanent partial disability due to the work injury alone based on medical or other evidence must be determined. *See Ceres Marine Terminal v. Director, OWCP,* 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997) (administrative law judge may resolve issue based on inferences regarding severity of pre-existing condition and work injury, and the strength of the relationship between them). It must then be determined if Claimant's manifest pre-existing disabilities materially and substantially contributed to his overall permanent partial disability by assessing their effect on the extent of claimant's current permanent partial disability, pursuant to applicable law.

Summary of Additional Evidence

Deposition of Dr. Foster[2]

Dr. Foster, an orthopedic surgeon, was again deposed on July 11, 2005. (AEX 1). Dr. Foster reiterated that he examined Claimant on December 3, 2002. (AEX 1-8). His examination of Claimant consisted of:

> [T]aking [Claimant's] history and performing a physical exam, reviewing the records. His primary complaints to me at the time centered around his right upper extremity. I reviewed a variety of records from recent and more remote treating physicians, performed a physical exam of the neck and right upper extremity, neurological exam, and diagnosed him with several problems.

(AEX 1-8). Dr. Foster recalled that Claimant's problems were that:

> He had prior lateral epicondylitis in the right elbow, which is pain around the elbow on the outside portion of the elbow. He had also had right shoulder surgery, as well as a release and replace – movement of the right ulnar nerve and release of the right radial nerve and the right carpal tunnel release. He had also had release of the ulnar nerve in his right wrist and had prior herniated disk.

[2] Dr. John Foster was previously deposed on March 13, 2003, in Atlanta, Georgia. (EX-24, at 1). Dr. Foster is the Staff Orthopedic surgeon at Northside Hospital at the Emory Dunwoody Medical Center in Atlanta; he has also had a private orthopedic practice for nine years. (EX-24, at 6-7). In his initial deposition, Dr. Foster testified that he examined Claimant on December 3, 2002. (EX-24, at 8). Dr. Foster testified as to the contents of the report, entered as Employer's Exhibit 8. (EX-24, at 9). Notably, Dr. Foster previously testified as to his apportionment of impairment between Claimant's work-related injury and Claimant's prior problems. In Dr. Foster's opinion, eighty percent of Claimant's problems "related to the repetitive stress injury" suffered on August 14, 1995; the remaining twenty percent, according to Dr. Foster, would have existed regardless of the work injury. (EX-24, at 16). Dr. Foster specifically noted Claimant's treatment for right lateral epicondylitis and olecranon bursitis on February 11, 1993, and explained that he felt "that aspect of [Claimant's] problem was distinct from the nerve decompressions that he's undergone otherwise associated with his repetitive stress injury." (EX-24, at 16). This finding led Dr. Foster to conclude that twenty percent of Claimant's problems would have existed regardless of the work injury. (EX-24, at 16).

(AEX 1-8).

Dr. Foster recalled that he had assigned Claimant restrictions of sedentary duty. Dr. Foster also informed Claimant that he should not use high torque tools and that he should refrain from grasping more than ten pounds. (AEX 1-9). Dr. Foster also assigned Claimant a twenty pound lifting restriction. (AEX 1-9). When asked to which of Claimant's conditions he attributed these restrictions, Dr. Foster responded:

> There was a combination of the diagnosis referable to his work injury of 14 August 1995, and also partially referable to the pre-existent problems which pre-dated that work injury

(AEX 1-9).

Dr. Foster noted that Claimant had a history of some surgical procedures to his neck and knees. Specifically:

> While [Claimant] had been on active duty in the Air Force he had had anterior cervical discectomy and fusion performed at C5-6 and C6-7 in the neck. [. . .] He'd also had arthroscopic surgery to the right knee, 1988, and the left knee in 1990. Beginning, I believe, in 1993, he'd had problems with his right elbow.

(AEX 1-10).

Dr. Foster was asked to apportion a percentage of disability to each of Claimant's conditions:

> I felt that 20 percent of his overall problem was attributable to the pre-existing right elbow, right lateral epicondylitis, and 80 percent was attributable to the work injury of 14 August 1995, which encompassed the other diagnoses of carpal tunnel, cubital tunnel, radial tunnel.

(AEX 1-11). Dr. Foster additionally opined that if, for the sake of argument, Claimant's 20 percent pre-existing condition with regards to the right elbow was removed from consideration, his physical restrictions would lessen as a direct result. Specifically:

> I think the work restrictions in that case would be light duty with 20 pound lifting restriction. I would delete the sedentary duty. I would also delete the proscription on high torque tools and 10 pound grasping.

(AEX 1-12).

Deposition of Dr. David Adams

Dr. Adams, a psychologist, was deposed on July 11, 2005. Dr. Adams testified that he examined Claimant twice in December of 2002. (AEX 2-7). Dr. Adams noted that during these sessions:

> [Claimant] was given a clinical interview where I obtained historical background data, medical history, vocational history, developmental history, occupational history, and the nature of his current injury and healthcare status up to that point. Administered a series of psychological tests to determined what, if any, psychological disorders from which he was then suffering.

(AEX 2-8).

Dr. Adams explained his ultimate diagnosis of Claimant:

> The patient was suffering from a pain disorder related to his work injury. The patient was also mild to moderately depressed. And there was also some concern as to the medication he was taking at that time and what impact, if any, it was having to make his symptoms actually worse rather than better.

(AEX 2-8). Dr. Adams elaborated, "The pain that [Claimant] was in from his orthopedic injury was leading to his depressive symptoms." (AEX 2-9). Dr. Adams agreed that if Claimant's pain were lessened, his symptoms associated with his depression would also likely reduce. (AEX 2-9). Dr. Adams noted that with less pain, Claimant would become more functional and be thus better able to do more things of his choice. (AEX 2-10).

Dr. Adams testified that he felt that Claimant would be able to engage in any work approved by his orthopedist. Dr. Adams explained:

> The injury sets certain limitations. The orthopod determines what those limitations are. Two things, number one, he is able to function – emotionally able to function. Since his depression is tied to his injury, whatever the orthopod says he is capable of doing orthopedically, he would be capable of doing emotionally. The second part of that is from a psychological standpoint, he would benefit from having more to do as long as that was within his orthopod's limitations.

(AEX 2-12).

Deposition of Linda K. Quinn

Ms. Quinn, a vocational rehabilitation case manager, was deposed on July 11, 2005. Ms. Quinn testified that she began working on Claimant's case in 2003. (AEX 3-8). Ms. Quinn's initial report, dated September 17, 2001, evaluated generally what jobs that an individual would be qualified to perform with an associate's degree in microcomputer specialist, computer

information systems in the Atlanta area. (AEX 3-8). The report concluded that there were at least six available positions within the Atlanta area. (AEX 3-10)[3].

Ms. Quinn testified that she completed a labor market survey for Claimant specifically on June 28, 2002. (AEX 3-10). Ms. Quinn found six openings at this time. (AEX 3-11).[4]

Ms. Quinn agreed that, generally, the fewer physical restrictions a person has, the more a potential job would be available. (AEX 3-15). Additionally, there would be more restrictions in that individual's earning capacity. (AEX 3-16).

Ms. Quinn testified that she performed a labor market survey for Claimant outside of the computer information system area. (AEX 3-17). Ms. Quinn noted that she began this process by performing a transferable skills analysis, which considered Claimant's educational history, work history and current physical capacity. (AEX 3-18). Ms. Quinn obtained this information by reviewing Claimant's medical records and rehabilitation reports. (AEX 3-18). Ms. Quinn noted that Claimant had an associate's degree in computer information systems, and had completed twenty years in the Air Force. (AEX 3-18). Ms. Quinn described Claimant's physical restrictions as of December 3, 2003, as "sedentary physical demand level with no repetitive grasping and no use of high torque tools." (AEX 3-19).

Following this analysis, Ms. Quinn identified the following general positions as appropriate for Claimant: order clerk, surveillance system monitor, telephone solicitor, escort vehicle driver, deliverer of car rentals, and a charge account clerk. (AEX 3-20). Ms. Quinn then looked within a 30 mile radius of Claimant's residence, and identified several openings within these general areas. (AEX 3-20). Ms. Quinn testified that her report listed the actual job openings and wages for each position. (AEX 3-20). Ms. Quinn testified that she drafted a second report on February 13, 2003 to locate updated job openings. (AEX 3-22). This updated survey identified positions ranging from $7/an hour to $12/an hour. (EX 18).

Ms. Quinn testified generally that with fewer restrictions, she would be able to come up with more job opportunities available for an individual. (AEX 3-24).

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[3] This report fails to include the salary for each listed position, and would thus be insufficient in determining an individual's wage earning capacity possessing these qualifications. (EX 18).

[4] Claimant received his associate's degree in May of 2002. Despite Ms. Quinn's identification of 6 jobs in June of 2002, the post trial stipulations indicate that Claimant unsuccessfully sought work in the computer field. Additionally, vocational expert Sadler testified that there was no current market for Claimant in the computer field. (CX 39). Finally, Ms. Quinn's 2002 report acknowledges that a high percent of computer positions require at least two years experience, and that as little as 10% of the positions are entry level. Thus, Claimant's "job search may take more time as [Claimant] lacks practical experience." (EX 18). Thus, this report is insufficient in demonstrating Claimant's wage earning capacity. Additionally, the previous determination of Claimant's $150 weekly wage earning capacity has not been disturbed on remand, and therefore, as a matter of law, Claimant's current wage earning capacity remains $150 a week.

Labor Market Survey, August 15, 2005[5]

Ms. Quinn completed an additional labor market survey after reviewing Dr. Foster's deposition testimony. (AEX 4). The report noted:

> In the deposition, Dr. Foster is asked to comment on the work restrictions of [Claimant's] pre-existing conditions of right lateral epicondylitis be excluded from the provision on restrictions. Dr. Foster states with the exclusion, of the right lateral epicondylitis, [Claimant] would be capable of light duty with a 20 pound lifting restriction. Dr. Foster states that he would delete the sedentary duty restriction and delete the restriction of high torque tools and the 10-pound grasping restriction.

(AEX 4-1). Ms Quinn once again considered Claimant's educational and employment history, and sought jobs within a 40-mile radius of Claimant's residence. (AEX 4-2).

The labor market survey identified the following positions:

Employer:	IBM 200 Parkway Avenue Smyrna, GA 30080 770-419-4141
Position:	Sales Call Center Representative
Salary:	Company would not provide specific salary amount However, a range of $15.00 to $18.00 per hour was given.
Skills/Credentials:	Verbal and written communication skills, Associates or College degree, effective telephone rapport building skills, basic computer technology knowledge, sales aptitude, effective teaming skills, ability to understand computer needs, and problem solving abilities.
Job Duties/Physical	Will work as an end user inside software sales specialist.

[5] The Post-Trial Stipulations state:

> [E]mployer and carrier engaged rehabilitation expert Quinn who reported that there have been job openings in fields like motel desk clerk and automobile retail sales in which [C]laimant could be employed. These pay about $6.00 to $7.00 per hour according to her report. (EX 23).
>
> [. . .]
>
> [C]laimant should be entitled to a complete recovery to compensate for his loss; he should be awarded compensation for his loss of wage earning capacity. The parties stipulated to an earning capacity of $150.00 per week based on $6.00 per hour times 25 hours per week.

To reiterate, as the compensation determination was not disturbed on remand, Claimant's wage earning capacity resulting from his overall disability is $150.00 per week.

Demands:	Sales specialist will sell IBM distributed software to end user customers via the telephone. Successful candidates need to possess practical skills in software, hardware and other technology based areas. Must be able to learn and apply knowledge quickly. This is considered a sedentary job with heavy phone and keyboard use.
Employer:	Axium 1160 Aipharetta Highway Suite 545 Roswell, GA 30076 678-762-9281
Position:	Help Desk Support
Salary:	$28,000 to $30,000 per year
Skills/Credentials Necessary:	Must possess a 2 year Associates Degree in Computer Information Systems. Must have excellent verbal and written communication skills, must have thorough knowledge of all MS Applications and operating systems.
Job Duties/Physical Demands:	Will provide customer service and technical support for propriety software via ACD, outbound calls, e-mail, and fax. Will log issues and resolutions, and provide input for new products, features, usability and supportability. Will maintain and increase product knowledge on applicable products/applications via training, documentation and personal research. This is considered a sedentary job in an office environment. There is heavy telephone and keyboard use.
Employer:	Sink Energy Group, Inc. 280 Technology Parkway Norcross, GA 30092 770-390-9888
Position:	Help Desk/PC/Hardware/Software
Salary	$15.00 per hour
Skills/Credentials Necessary:	Must possess a minimum of a 2 year Associates Degree in the area of Computer Information Technology. Must have excellent communication skills, must have effective customer service.
Job Duties/Physical Demands:	This is an entry-level computer technician position responsible for installation, maintenance, support and repair of all PC software/hardware and some phone systems. Individual must be able to identify computer problems, diagnosis, repair and test equipment. The individual must be punctual and able to handle multi task and also be able to interact with people at all levels inside the company. This is a light level position.

Employer:	Bearer Homes 5775 Peachtree Dunwoody Road NE Atlanta, GA 30342 404-252-0614
Position:	Customer Care Coordinator
Salary:	Specific salary amount would not be provided. Salary is based on experience.
Skills/Credentials Necessary:	Must be high school graduate or equivalent. Detail oriented excellent customer service skills, organization, management and follow-up skills, computer skills and Microsoft Office.
Job Duties/Physical Demands:	Will provide administrative support for Customer Care Representatives. Will provide first line customer point of contact for post closing warranty related issues, ensure data entry into the customer care software for tracking and ensure accurate service order production and distribution. Will ensure that the computer database remains current.

Employer:	Titan National Security Solutions 3033 Science Park Road San Diego, CA 92121 858-552-9500 (Atlanta Office)
Position:	Help Desk/Customer Care Center
Salary:	Specific salary information would not be provided.
Skills/Credentials Necessary:	Minimum requirement of Associates Degree in Computer Science Field, prefer previous help desk support experience.
Job Duties/Physical Demands:	Responsible for help desk support and customer satisfaction. Will receive, log, monitor and process trouble tickets and remedy help desk application software. Will provide basic trouble shooting for operating system, network activity, standard applications and proprietary applications. Will provide general technical support for all dial hi/remote access systems. Will participate in the resolution of service requests. This is a sedentary position with heavy keyboarding and telephone use.

The following are entry-level positions that were targeted in the local labor market;

Employer:	Home Depot 50 Ponce Dc Leon Avenue NE Atlanta, GA 30308 404-892-8042
Position:	Credit Market Coordinator
Salary:	Home Depot would not provide specific salary amount
Skills/Credentials Necessary:	Must be 18 years of age or older. Must pass drug test. Must have PC skills in Word, Excel and PowerPoint. Must have

	excellent written and verbal communication skills. Credit marketing and direct marketing experience preferred, but not required.
Job Duties/Physical Demands:	This position is responsible for developing and executing credit marketing programs to generate new sales accounts for Home Depot companies. It is a sedentary position. There is some telephone and keyboarding use.
Employer:	Office Depot 5345 Oakbrook Parkway Norcross, GA 30093 678-380-1912
Position:	Outbound Sales Representative
Salary:	$13.00 to $15.00 per hour
Skills/Credentials Necessary:	High school diploma or equivalent work experience. Excellent communication and interpersonal skills. Demonstrated ability to sell. Detail oriented. Working knowledge of computer, Microsoft Office or comparable software.
Job Duties/Physical Demands:	Perform inside sales functions over telephone resource, Increase revenues through new business acquisitions, product penetration and account retention. Will provide product information and selection assistance to customers. This is a sedentary to 1ight job. There is heavy telephone use. There is computer use.
Employer:	Atlanta Journal Constitution 72 Marietta St. N.W, Atlanta, GA, 30303 404-526-5151
Position:	Sales/Account Management Telemarketing
Salary:	The company would not provide specific salary amount,
Skills/Credentials Necessary:	Must have excellent written and oral communication skills, possess basic mathematical aptitude, and be able to multi task to meet deadlines.
Job Duties/Physical: Demands:	Will work as a phone sales representative to sell subscriptions to the Atlanta Journal Constitution. Will provide the customer with all information and excellent customer service. This is a sedentary job with heavy telephone and computer use.
Employer:	Dynasis Integrated System 1100 Old Ellis Road Roswell, GA 30076 770-569.4600
Position:	Inside Sales/Telemarketer
Salary:	The company would not provide specific salary amounts.
Skills/Credentials Necessary:	Associates Degree, excellent phone voice and excellent organizational skills.

Job Duties/Physical Demands:	Telemarketers needed for Dynasis, a Roswell based IT business solution company. This position involves making outbound calls to qualify and generate leads, and setting appointments for our IT and web business solutions sales department. This is a sedentary job. There is heavy phone and computer use.
Employer:	Network Courier Systems 3469 Deerbom Plaza Haperville, GA 30354 404-305-1500
Position:	Dispatcher
Salary:	$28,000 to $32, 000 per year
Skills/Credentials	Prefer Associates Degree, but will consider High School with 2 year's worth of experience. Must have excellent communication skills, must be detail oriented
Job Duties/Physical Demands:	Will work as dispatcher for busy courier company. This is a sedentary position. There is heavy telephone and computer use.
Employer:	Insol 2065 Peachtree Industrial Court Chamblee, GA 30341 770-458-8658
Position:	Business Development Sales
Salary:	Company would not provide specific salary amounts
Skills/Credentials Necessary:	Candidate will be high energy, disciplined individual with outstanding communication skills. Must feel comfortable on the telephone and computer literate. An Associates degree is preferred for this position.
Job Duties/Physical Demands:	Will work as inside sales representative using telephone and appointment setting. Will be selling technical, consulting or business services. This is a sedentary to light level position in an office environment.

Wage Information:

Rehabilitation specialist has researched current wage outlooks for the positions outlined in this labor market survey. The following wage information was located on American Career's Infonet. The median salary for a Computer Support Specialist in the State of Georgia is $42,100 This is slightly ahead of the national median of $39,900. The outlook for wages in Georgia for a Telemarketer is $22,000 per year. Again, this is slightly ahead of the national outlook of $20,300. Lastly, the outlook for Dispatchers in the state of Georgia is $23,600 per year. This is right in line with the national outlook for dispatchers.

Conclusion

This rehabilitation specialist has located numerous positions in the Metropolitan Atlanta, Georgia area both in the computer information field and the entry level fields of telemarketing, customer service, and dispatcher. It continues to appear that Mr. Cox is employable utilizing current skills.

Analysis

On remand, the Board did not disturb the previous finding that Claimant suffered from a pre-existing injury, and that such pre-existing injury was manifest to Employer. As such, only discussion of the contribution element for 8(f) relief is necessary.

Contribution Element

In order to establish the contribution element, employer must present medical or other evidence addressing the extent of claimant's permanent partial disability had the pre-existing injury never existed. *See Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 31 BRBS 141(CRT) (5th Cir. 1997); *Director, OWCP v. Ingalls Shipbuilding, Inc. [Ladner]*, 125 F.3d 303, 31 BRBS 146(CRT) (5th Cir. 1997). Such evidence permits the administrative law judge to assess whether the pre-existing conditions made claimant's overall disability materially and substantially greater than that which results from the work injury alone. *Ladner,* 125 F.3d at 308, 31 BRBS at 149(CRT).

In reversing the previous holding in the present case, the Board found that the proper legal standards were not followed in addressing whether Claimant's pre-existing permanent partial disability contributes to his overall permanent partial disability. The Board found that Dr. Foster's opinion did not expressly address the extent of Claimant's disability due to the subsequent injury alone. [6] In this regard, the Board held that his opinion does not address the role played by Claimant's work-related chronic pain syndrome, depression, and medication regimen, which are related to claimant's August 14, 1995, work injury. The Board reiterated that the contribution element is not satisfied merely by showing that claimant's physical condition is worse due to the combination of the pre-existing condition and the work injury. *Director, OWCP v. Bath Iron Works Corp,* 129 F.3d 45, 31 BRBS 155(CRT) (1st Cir. 1997). Thus, the Board found that the fact that Dr. Foster has apportioned the causes of Claimant's physical impairment between the pre-existing and work injuries cannot establish that the contribution element is

[6] In the first instance, Dr. Foster's medical reports and deposition testimony were credited in the granting of Section 8(f) relief. Dr. Foster opined that claimant has work restrictions limiting him to sedentary work, and is prohibited from working with high torque tools, repetitive grasping over 10 pounds, and lifting over 20 pounds. EX 24 at 21-22. He stated that these work restrictions apply to all of claimant's diagnosed problems, and that all of Claimant's current right upper extremity complaints relate to the work injury. *Id*. at 23, 35. Dr. Foster stated, however, that claimant's disability is materially and substantially greater because of his pre-existing right elbow pathology. He apportioned 80 percent of claimant's current disability to the work injury and 20 percent to the pre-existing right elbow conditions. Dr. Foster stated that the combination of claimant's pre-existing elbow conditions and the work injury lessens claimant's employability. EX 8 at 29; EX 24 at 15-17, 23-24.

satisfied. Rather, the Board held that Employer must demonstrate that the work injury alone did not cause claimant's loss in wage-earning capacity and that the pre-existing conditions materially and substantially contribute to this disability. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116(CRT) (4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122, 29 BRBS 87(CRT)(1995). As the evidence in terms of the extent of claimant's disability or loss of wage-earning capacity due to the work injury alone was not previously addressed, the Board reversed the finding that the contribution element is satisfied.[7] *See generally Quan*, 203 F.3d 664, 33 BRBS 204(CRT); *Louis Dreyfus Corp.,* 125 F.3d 884, 31 BRBS 141(CRT).

In the initial Decision and Order, it was determined that this DBA case fell within the jurisdiction of the Seventh Circuit Court of Appeals. This finding remained undisturbed on remand. There does not seem to be any decisions from the Seventh Circuit regarding this contribution element of Section 8(f) relief. However, guidance can be obtained from various other circuits, in addition to the Board's instructions.

The statute requires that, in cases where a permanent partial disability results, the employer must prove that "such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone . . . ." 33 U.S.C. § 908(f)(1) (2002). The Fifth Circuit United States Court of Appeals addressed the contribution element of Section 8(f) in *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748 (5th Cir. 1990). In noting that an application of 8(f) in cases of permanent partial disability requires a "heavier burden" than cases of permanent total disability, the court stated:

> To be entitled to compensation under [the Act], when the employee is *totally* disabled the employer must establish that the employee seeking compensation had: (1) an 'existing permanent partial disability' before the employment injury; (2) that the permanent partial disability was "manifest" to the employer; and (3) that the current disability is not due solely to the employment injury. (cites omitted). When an employee is permanently *partially* disabled and not totally disabled, the employer must make not only the three showings listed above, but must also show that the current permanent partial disability 'is materially and substantially greater than that which would have resulted from the subsequent injury alone.' 33 U.S.C. § 908 (f) (1).

894 F.2d at 750 (emphasis original).

Further, the Fifth Circuit rejected the "common sense" test which "presumes that when a claimant who had a history of back problems previous to his employment suffers a work related injury to his back, the current disability is not due solely to the employment injury" stating that such a test "reads the third element of proof out of the law by collapsing the first and third elements." (*Id*.).

[7] The parties stipulated that, after considering Claimant's restrictions and the extent of his current disability, Claimant has a $1,460 weekly loss of wage-earning capacity following his work-related injury.

In *Two "R" Drilling*, the court found that as a matter of law, the employer had not met its burden of showing that the claimant's overall disability was not due solely to the employment injury since it "put no medical evidence before the ALJ which suggests that [the claimant's] pre-existing disability in any way contributed to his current total disability." (*Id*.)

The United States Court of Appeals for the Ninth Circuit explicitly held that the Act does not require employers to submit "medical opinions" to establish the contribution requirement of Section 8(f). *Sproull v. Director, OWCP*, -- F.3d --, Nos. 94-70906, 94-70914 (9th Cir. June 17, 1996.) Noting that an employer is entitled to establish the contribution element by medical or *other* evidence, the Ninth Circuit held that the administrative law judge permissibly relied on claimant's testimony regarding the effects of his injuries in performing his work to establish the contribution requirement. Consequently, the Ninth Circuit reinstated the administrative law judge's grant of special fund relief.

The First Circuit noted that a "heavier burden" is placed upon employers in permanent partial disability cases than in the case of a totally disabled employee. *Director, OWCP v. Bath Iron Works Corp.*, 129 F.3d 45, 51 (1st Cir. 1997). The First Circuit went on to note that "an employer is required to show the degree of disability attributable to the work-related injury, so that this amount may be compared to the total percentage of the partial disability for which coverage under the LHWCA is sought." *Id*.

The Fourth Circuit explained the contribution element in *Newport News Shipbuilding & Dry Dock v. Director, OWCP (Harcum I)*, 8 F.3d 175 (4th Cir 1993):

> To satisfy this additional prong of the contribution element, the employer must show by medical evidence or otherwise that the ultimate permanent partial disability materially and substantially exceeds the disability as it would have resulted from the work-related injury alone. A showing of this kind requires quantification of the level of impairment that would ensue from the work-related injury alone. In other words, an employer must present evidence of the type and extent of disability that the claimant would suffer if not previously disabled when injured by the same work-related injury. Once the employer establishes the level of disability in the absence of a pre-existing permanent partial disability, an adjudicative body will have a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater.

Id. at 185-6.

Subsequently, in *Carmines*, 138 F.3d at 134, 32 BRBS at 48(CRT), the Fourth Circuit applied the *Harcum I* holding in the context of an employer's seeking Section 8(f) relief for a permanent partial disability award to a claimant for work-related asbestosis. The court denied employer Section 8(f) relief because employer was unable to establish what degree of disability claimant would have suffered from the asbestosis alone, specifically holding that employer failed to meet its burden to quantify the disability that claimant would have suffered absent any pre-existing conditions. The court held that it is not proper simply to calculate the current disability and to subtract from this the disability that resulted from the pre-existing disability. *Id.*, 138 F.3d at 143, 32 BRBS at 55(CRT). The court stated that without the quantification of the disability due solely to the subsequent injury, it is impossible for the administrative law judge to determine

that claimant's ultimate disability is materially and substantially greater than it would have been without the pre-existing disability. *Id.; see also Harcum II*, 131 F.3d at 1079, 31 BRBS at 164(CRT).

In the present case, the Director urges the use of the "quantification" analysis required by the Fourth Circuit. Specifically, Director argues that Dr. Foster's opinion is entitled to no weight because he fails to "quantify" the work injury. The Director notes that Dr. Foster only discusses a proportional relationship between the work injury and the preexisting condition, but neglects to attribute a percentage of disability to the work injury alone. Additionally, the Director argues that neither Dr. Foster nor Dr. Adams quantified the significant disability effects of Claimant's depressive disorder. Though the Board cited the *Harcum* case in remanding the present case, it did not specifically mandate a precise quantification as a prerequisite for Sections 8(f) relief. Rather, the Board cited to *Harcum* for its proposition that that "Employer must demonstrate that the work injury alone did not cause claimant's loss in wage-earning capacity and that the pre-existing conditions materially and substantially contribute to that disability." (BRB D&O pg. 5; citing *Harcum I*, 8 F.3d at 27.) As the other circuits have not provided specific guidance as to the degree of quantification necessary to meet the "materially and substantially greater" standard in cases where claimant is permanently partially disabled following the subsequent injury, and such analysis was not expressly mandated by the Board on remand, I find that Dr. Foster's failure to specifically "quantify" Claimant's work does not automatically entitle his opinion to no weight.

The Director also argues that there is insufficient evidence to show that Claimant's permanent partial disability is due to the work injury alone. Additionally, the Director purports that Employer has failed to sustain its burden of proof that Claimant's permanent partial disability was rendered materially and substantially greater by his pre-existing disability.

Employer argues that the record establishes that Claimant's pre-existing disabilities combined with his work-related injury and rendered him permanently, partially disabled to a greater degree than the work-related injury alone would have. In support, Employer offers the opinion of Dr. Foster, who again opined that twenty percent of Claimant's current problems relate to Claimant's previous injuries to his right elbow, and eighty percent relate to the work-related injury Claimant suffered on August 14, 1995. Dr. Foster further testified that had Claimant not suffered from his pre-existing disability, he would not be under the sedentary duty and the prescription of high torque tools and 10 pounds of grasping. Employer thus argues that the extent of Claimant's current disability would lessen as he became more employable under fewer physical restrictions.

Employer also offers the testimony of Dr. Adams, who opined that Claimant's depression is directly related to his inability to work. Dr. Adams testified that Claimant's mental state would improve if he were under fewer physical restrictions, thereby allowing Claimant a better opportunity to secure employment. Dr. Adams testified that Claimant's mental state does not prevent him from working. Rather, it is his inability to work that affects his mental state. Employer argues that removing the work restrictions associated with Claimant's preexisting condition would improve his mental condition and make Claimant more employable. Thus, the fact that Claimant is under more severe work restrictions because of his pre-existing disability,

further preventing him from working, renders him more depressed. Therefore, Employer argues, Claimant's depression is more severe than had it been in the face of his work injury alone.

Employer also argues that Ms. Quinn's report and testimony support a finding that Claimant's pre-existing injury materially and substantially contribute to his current disability. Ms. Quinn testified generally that the fewer physical restrictions, the more jobs that would be available to Claimant, thereby improving Claimant's earning capacity. (AEX 3 - 14, 15). When Ms. Quinn initially identified her work via her Labor Market Survey, she considered Claimant's work restrictions imposed by Dr. Foster, including the sedentary physical demand with no repetitive grasping or use of high torque tools. (AEX 3 - 19). Ms. Quinn testified that had Claimant's work restrictions been less, she would likely have been able to come up with more job opportunities suitable for Claimant.

As further evidence in support of this opinion, Ms. Quinn performed an additional labor market survey on August 15, 2005. (AEX 4). This Labor Market Survey included Ms. Quinn's review of Dr. Foster's deposition wherein he stated that removing the work restrictions associated with Claimant's pre-existing condition would render Claimant capable of performing light duty with a 20 pound lifting restriction. Based upon Claimant's experience, education, background and the new work restrictions omitting the pre-existing disability, Ms. Quinn was able to identify a customer support specialist with an annual salary of $42,100.00, a telemarketer position with an annual salary of $22,000, and a dispatcher position with an annual salary of $23,600. (AEX 4). I find that this Labor Market Survey sufficiently evidences the nature and terms of each position that would be available to Claimant if he suffered only from his work-related injury.

Based upon the opinion and report of Ms. Quinn, and the hypothetical work restrictions of Dr. Foster omitting Claimant's pre-existing condition, Claimant could potentially earn up to $42,100.00 a year, which would result in a post-injury wage earning capacity of $809.62 a week. At the bottom end of Ms. Quinn's report, Claimant is capable of earning $22,000.00 a year, which translates into potential weekly earnings of $423.08. The parties had previously stipulated that Claimant's pre-injury average weekly wage was $1610.00, and that following his occupational injury, Claimant had a wage-earning capacity of $150, and thus a loss of wage earning capacity of $1460.00. per week. Two thirds of the loss of wage earning capacity then would equal $973.33, but the parties agreed to a maximum rate of $760. According to Ms. Quinn's Labor Market Survey, Claimant would have a higher wage earning capacity absent the restrictions associated with his pre-existing injury.

On remand, the Board specifically instructs that the extent of Claimant's current permanent partial disability due to the work injury alone based on medical or other evidence must be determined. *See Ceres,* 118 F.3d at 31 BRBS 91(CRT). The Board also mandated a determination of whether Claimant's manifest pre-existing disabilities materially and substantially contributed to his current permanent partial disability by assessing their effect on the extent of Claimant's current permanent partial disability, pursuant to applicable law.

Following the instructions of the Board, I find that the evidence offered by Employer sufficiently establishes that the work injury alone did not cause claimant's loss in wage-earning

capacity and that the pre-existing conditions materially and substantially contribute to this disability. Dr. Foster clearly opined that had Claimant suffered from his work-related injury alone, he would be capable of light duty with a 20 pound lifting restriction. However, because of Claimant's pre-existing injuries, he had also been placed under the additional restrictions of sedentary duty and a proscription on high torque tools and 10 pound grasping. A hypothetical labor market survey was conducted which considered Claimant's education and experience and only those aforementioned restrictions directly caused by his work related injury. As discussed above, the results of this survey indicate that Claimant would have a much lower loss of wage earning capacity if he suffered from only the work injury alone.[8]

The evidence in the record establishes that Claimant's overall disability and loss of wage earning capacity is not due to his work-related injury alone. Because Dr. Foster directly linked Claimant's additional restrictions to his pre-existing injury, and these restrictions significantly affect Claimant's wage earning capacity, I conclude that the pre-existing conditions materially and substantially contribute to this disability. Without Claimant's pre-existing problems, Claimant would not suffer from his permanent partial disability at its current degree and extent. As such, I find that the Employer is entitled to relief under Section 8(f) of the Act.

ORDER

Accordingly, it is hereby ordered that:

1. Employer, McDonnell Douglas/Boeing, shall pay compensation in accordance with the July 2, 2003, Decision and Order on Reconsideration.

2. Employer, McDonnell Douglas/Boeing, is entitled to Special Fund relief under 33 U.S.C. § 908(f) of the Act upon the expiration of 104 weeks from February 7, 1997.

3. Thereafter, compensation and adjustments shall be paid by the Special Fund established pursuant to the provisions of 33 U.S.C. § 944.

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[8] At the highest end, an annual salary of $42,100.00 would result in a posted injury wage earning capacity of $809.62 ($42,100/52). This is $659.62 ($809-$150) more than the stipulated post-injury wage earning capacity, and thus, the pre-existing injury has cased an additional loss of wage earning capacity at a significant amount. A post-injury wage earning capacity of $809.62 a week would result in a permanent partial disability rate of $533.59 a week ($1,610-$809.62 x 2/3). This is a reduction of $227.28 a week from Claimant's current permanent partial disability award of $760.89 a week. Even at the low end, Claimant's potential earnings have been limited by his pre-existing condition. At the lowest end, Claimant has the potential to earn $22,000 a year. This translates into potential weekly earnings of $423.08 a week ($22,000/52). This results in an earning capacity of $273.80, above the stipulated $150. However, under this, Claimant would still be entitled to the maximum compensation rate. Nonetheless, this evidence establishes that Claimant's work related injury did not by itself cause Claimant's disability and loss of wage earning capacity.

Administrative Law Judge